No. 13,156

IN THE

United States Court of Appeals

For the Ninth Circuit

STERLING CARR, Trustee of the estate of Nippon Yusen Kaisya, a corporation, bankrupt,

Appellant,

vs.

THE YOKOHAMA SPECIE BANK, LTD., OF SAN FRANCISCO, a foreign corporation, and MAURICE C. SPARLING, as Superintendent of Banks of the State of California and Liquidator of the Yokohama Specie Bank, Ltd., San Francisco Office,

Appellees.

Appellant's Opening Brief

Appeal from the Judgment of the United States District Court for the Northern District of California, Southern Division.

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Appellant's Opening Brief

Appeal from the Judgment of the United States District Court for the Northern District of California, Southern Division.

JURISDICTION

This is an appeal by Sterling Carr, Trustee in Bankruptcy, from final judgment of the United States District Court for the Northern District of California, Southern

Division, entered August 20, 1951, ordering, adjudging and decreeing that plaintiff take nothing by reason of his complaint or cross-complaint, and that defendant Maurice C. Sparling, Superintendent of Banks of the State of California and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office, have judgment against plaintiff for his costs of suit, and that plaintiff in intervention also have judgment against plaintiff for his costs of suit.

The jurisdiction of the United States District Court was invoked under U. S. Code, Title 28, section 1332.

The jurisdiction of plaintiff in intervention was invoked under the Act of March 3, 1911; 36 Stat. 1091; U. S. Code, Title 28, section 41(1) and under the Act of October 6, 1917; 40 Stat. 425; U. S. Code, Title 50, Appendix, section 17.

Notice of appeal was filed on September 11, 1951 (U. S. Code, Title 28, section 2107, Rule 73 R.C.P.).

The jurisdiction of this Court is invoked under Jud. Code Sec. 128; U.S. Code, Title 28, section 1291.

STATEMENT OF THE CASE

Identity of Parties to the Case.

Sterling Carr, the appellant, is the trustee in bankruptcy of Nippon Yusen Kaisya, a corporation, organized under the laws of Japan, with its principal office and place of business in Tokyo. Pursuant to involuntary petition of American creditors, Nippon Yusen Kaisya was adjudicated a bankrupt and ever since July 2, 1942, plaintiff and appellant has been the trustee of the estate of the bankrupt.

Plaintiff in intervention and cross-defendant is J. Howard McGrath, Attorney General of the United States, as successor to James E. Markham, former Alien Property Custodian.

The history of said intervention is as follows: The original action of the trustee in bankruptcy was against The Yokohama Specie Bank, Ltd. and the Alien Property Custodian. The Alien Property Custodian filed a motion to dismiss for lack of jurisdiction, and then by agreement with plaintiff, intervened as a plaintiff in intervention to said complaint. Sterling Carr, the trustee, answered and filed a cross-complaint; James E. Markham, Alien Property Custodian, then filed his answer to said cross-complaint (Tr. 77-8).

The remaining defendant, Superintendent of Banks of the State of California, as liquidator of The Yokohama Specie Bank, Ltd. of San Francisco, a foreign corporation, took over the business and affairs of said bank on or about December 8, 1941 for the purpose of conservation and/or liquidation.

Nature of the Case.

The complaint states a cause of action to quiet title to personal property, to wit, the sum of $66,892.65 (which sum was corrected to $66,884.15) standing in the name of "Consul General—Yoshio Muto Special Account" on deposit with Yokohama Specie Bank, San Francisco (Tr. 7-11, inc.).

Plaintiff, as trustee in bankruptcy, asserts that a trust is imposed by law upon these funds in favor of the American creditors of Nippon Yusen Kaisya, since all moneys in said account were funds of Nippon Yusen Kaisya (hereafter referred to as "NYK"), including proceeds of sales of passenger tickets on the Japanese Government requisitioned vessel *Tatsuta Maru,* voyage 69-0 and voyage 69-H,

and the further fact that the Government of the Empire of Japan concedes that said $66,884.15 is the property of NYK (Tr. 70-82, inc.).

Plaintiff in intervention, as successor to the former Alien Property Custodian, asserts a claim solely by virtue of Amendment to Vesting Order No. 256 dated September 7, 1943, made pursuant to the Trading with the Enemy Act (Tr. 24).

Defendant Superintendent of Banks asserts that he is holding the funds in the account solely for the person in whose name the account stands, to wit, Yoshio Muto, Consul General of Japan, and in the absence of a Court order adjudicating the funds as payable to the trustee in bankruptcy, said defendant must comply with Vesting Order No. 256 and take the position that the title to said money is vested in plaintiff in intervention (Tr. 21).

Statement of Facts.

Since all of the evidence introduced by the trustee in bankruptcy, the Superintendent of Banks, and plaintiff in intervention stands uncontradicted, the case can indeed be considered as resting on a stipulated set of facts. Neither the Superintendent of Banks nor plaintiff in intervention has introduced any affirmative proof other than the bare status of the account, and a series of Treasury Department permits for receiving payments into the account and making withdrawals therefrom. We therefore ask the Court's indulgence and patience while we summarize, somewhat fully, all of such uncontradicted testimony.

During September and October 1941 there was discussion between the Governments of Japan and the United States

with a view to working out an arrangement for the repatriation of Japanese nationals who desired to return home because of the application of the monetary freezing order of July 26, 1941 (Executive Order No. 8389 as amended) under which all trade and maritime relations between Japan and the United States ceased. (Plaintiff's Exhibit 20-E, page 1; Tr. 194-5.)

Because of fears that vessels of privately owned Japanese steamship companies would be seized upon entry into the United States by suits brought by American creditors of said aliens, and because the United States Government would not guarantee that privately owned Japanese vessels would be exempt from seizure upon such legal process (Plaintiff's Exhibit 20-E, pp. 2 and 3), it was agreed between the two Governments that the vessels of two Japanese steamship lines, NYK and Osaka Shosen Kaisha, should be dispatched as nominally Japanese Government requisitioned ships. Such procedure would allow the ships freedom to enter and leave the ports of the United States without fear of seizure and detention by suits of American creditors of the steamship companies.

Pursuant to said agreement between the two Governments, on September 30, 1941, the Cabinet of the Japanese Government decided to arrange a special assignment of the *M.S. Tatsuta Maru* to sail from Yokohama on October 10, 1941 (this was later changed to October 15) to pick up Japanese nationals desiring repatriation from Honolulu and San Francisco (Plf.'s Exhibit No. 20(E), pages 1 and 2).

In addition, the Government of Japan agreed to allow American nationals desiring to return to the United States to sail on this vessel (Plf.'s Exhibit No. 20(E), page 5).

It was arranged between the Empire of Japan and the NYK that operation costs of said vessel would be borne by NYK, but that inasmuch as all Japanese funds in the United States were frozen by virtue of said "freezing order" of July 26, 1941, it was deemed appropriate to transmit NYK funds originating in Japan, via the YSB, direct to the Consulates at the ports of call, in amounts sufficient to take care of the said operations costs (Exhibit 20(E), page 6). It was decided to so transmit for so-called "bunker charges" the total sum of $96,100.00, which included the $39,000.00 to San Francisco for use in outfitting the *Tatsuta Maru* for the home voyage (Plf.'s Exhibit 20(E), page 7). This $96,100.00 originated with the NYK home office in Tokyo and was transmitted by cable transfer on October 20, 1941, in Japanese yen (410,026.22) (Plf's Exhibit No. 20(C), Debit Note) and converted on that date to foreign exchange currency (Plf.'s Exhibit 20(A)—Application for approval to purchase foreign exchange notes). Said sum was on said date turned over by the NYK to the Foreign Ministry of the Japanese Government (Plf.'s Exhibit No. 20(B)—Receipt) and transmitted by the Japanese Government through YSB Tokyo by telegraphic transfer to the United States (Plf.'s Exhibit 20(B)—Temporary Receipt). Of this sum $39,000.00 was transferred into the account entitled "Consul General—Yoshio Muto Special Account" on deposit in YSB San Francisco (Plf.'s Exhibit 20(B) — Receipt, Plf.'s Exhibit 25). Thus the account which is the subject of this action was set up with this initial deposit of $39,000.00 (Plf.'s Exhibits Nos. 1, 21, 22, 23, 24, 26, 27 and 30).

In addition to the $39,000.00 remitted as aforesaid, there was also deposited in said account at YSB San Francisco,

additional moneys received from the sale of passage tickets in the United States to Japanese nationals returning home upon the *Tatsuta Maru,* in the sum of $66,937.43, making total deposits of $105,937.43 (Plf.'s Exhibits 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20(D), page 3, and Exhibit 21). From the account the total sum of $39,053.28 was withdrawn for the purpose of paying expenses of outfitting the *Tatsuta Maru* for the voyage to Japan, Voyage 69-H, departing from San Francisco November 2, 1941, leaving a balance in said account as of December 7, 1941, $66,884.15 (Plf.'s Exhibits Nos. 2, 20(D), page 3, and Plf.'s Exhibits 21 and 30).

In addition to the passenger fare collections deposited in said account, NYK and the Empire of Japan (through the Consul General at San Francisco) validated and recognized outstanding tickets issued many months before by the NYK in Japan, and provided such holders of tickets with space upon the *Tatsuta Maru.* All such fares had been sold and the money deposited in the various places, such as Yokohama, Seattle, Los Angeles, Tokyo, etc. (Plf.'s Exhibits Nos. 4, 7, 10, 11, 12, 15, 16, 20(I) and (J)).

In addition, passage was furnished returning Japanese members of Japanese firms located in the United States, with the understanding that the fares would be paid on arrival in Japan, exclusively to the NYK Tokyo office (Plf.'s Exhibits Nos. 11, 17, 20(I) and (J)). Such payments were made and received by the NYK Tokyo, none of them ever being paid to the Empire of Japan or to Yoshio Muto individually, in Japan or elsewhere (Plf.'s Exhibit 20(I) and (J)).

NYK operated the vessel, furnished the services for said operations and kept all of the records thereof. Yoshio Muto

was merely custodian of the funds in name and paid same out without question upon request of NYK, San Francisco office (Plf.'s Exhibit No. 2 found in records of NYK, San Francisco office). Only in such a manner could a proper accounting with the Japanese Government be made at the end of the voyage pursuant to the understanding contained in the agreement between NYK and the Empire of Japan (Plf.'s Exhibit No. 20(E), page 6). According to said agreement, after accounting for all advances and passenger collections, the Japanese Government agreed to reimburse NYK for any losses resulting from the operations of the repatriation ships (Plf.'s Exhibit No. 20(F)). Furthermore, the Japanese Government admitted that the funds in all of these Consulate special accounts were moneys belonging to NYK and conceded that such accounts only took the form of special consulate accounts as a formality, owing to the application of the Freezing Act (Plf.'s Exhibit 20(F), letter from Chief Accountants Bureau directed to Ministry of Foreign Affairs, and letter from Ministry of Foreign Affairs to President, NYK).

Furthermore, it was agreed by and between the Japanese Government and NYK that the said balance of $66,884.15 was to be returned to NYK after an accounting was had and settled between NYK and the Empire of Japan (Plf.'s Exhibits 20(D), (E) and (F)).

ERRORS ASSIGNED BY APPELLANT

I. The District Court Erred in Failing to Make a Finding on the Issue "Did NYK Furnish or Provide the Consideration Out of Which the Bank Account Involved Arose?"

II. The District Court Erred in Holding That the Evidence of Appellee (Exhibits F, H, I, J and K) Is Contradictory to the Resulting Trust Theory of Appellant.

III. The District Court Erred in Holding, as a Matter of Law, That the Evidence Before the Court Sustains a Finding That the Tatsuta Maru Was a Japanese Government Requisitioned Vessel.

IV. The Court Erred in Holding That Said Transaction, if the Basis of a Resulting Trust, Was One in Violation of Federal Laws.

ARGUMENT

I.

The District Court Erred in Failing to Make a Finding on the Issue "Did NYK Furnish or Provide the Consideration Out of Which the Bank Account Involved Arose?"

The District Court stated that two issues were presented for decision—one of fact and one of law, as follows (Memorandum Opinion, Tr. p. 39):

"I. Did NYK furnish or provide the consideration out of which the bank account involved arose?

"II. Even if it did, was it a transaction to which the courts can give judicial recognition since it was in violation of Federal laws?"

The District Court, in holding that the evidence introduced by plaintiff "falls short of establishing a resulting trust", found as follows (Memorandum Opinion, Tr. pp. 46-7):

"To support his position the plaintiff introduced documentary evidence and the deposition of one Seishi Hiroyoshi taken in Tokyo on interrogatories and cross-interrogatories. Much of this evidence was admitted

subject to motion to strike on the ground that it was hearsay and no foundation had been laid. The deposition discloses that the witness was employed in NYK's New York office during the period involved and that his only knowledge of the transaction came from certain papers that he found in the files of NYK's Tokyo office several years later. The Court was liberal in admitting such evidence, having in mind that this is an action in equity. However, it is axiomatic that to establish a resulting trust the evidence must be clear and convincing. In this case, while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was thereby created. To find such a trust relationship the Court would have to rely on opinions and conclusions of the witness and on certain correspondence had between NYK Tokyo and Japanese Government officials, months and even years after the events herein and after the interests of the United States had intervened. When this evidence is weighed against the undisputed evidence that the Tatsuta Maru was operated as a Japanese Government requisitioned vessel, that NYK and the Government of Japan stated under oath that no one other than the Government of Japan had any interest in the bank account involved, and that NYK applied for and received permission from the Treasury Department to be paid an agency fee for its handling of the ship, it falls short of meeting the 'clear and convincing' test necessary to establish a resulting trust."

In support of this conclusion the Court must have relied upon the following exhibits for the defendant:

Exhibit F. Application No. SF 11537 (Tr. p. 325)

Exhibit H. Application No. SF 11539 (Tr. p. 329)

Exhibit I. Application No. SF 11540 (Tr. p. 329)
Exhibit J. Application No. SF 11541 (Tr. p. 332)
Exhibit K. License No. 12971, 11/19/41 (Tr. pp. 334-335)

Nevertheless, in arriving at its decision the Court has failed to answer the issue—"Did the NYK furnish or provide the consideration out of which the bank account involved arose?" The Court, in failing to make a finding on this issue, completely disregarded the uncontradicted fact that NYK Tokyo did provide the funds (Exhibits A, B, C, D, E and F attached to deposition of Hiroyoshi, Tr. commencing p. 168). In order to arrive at its decision the Court negatively answers the question by stating that the appellant trustee in bankruptcy, at the trial, had failed to establish by clear and convincing evidence that a resulting trust exists. In arriving at this conclusion the Court erred in refusing to take into its consideration the underlying, undisputed fact that the bank account in issue came into being by the $39,000 of NYK money forwarded from Japan to Yoshio Muto at San Francisco. The Court in stating in its opinion that appellant, representing the creditors, had no beneficial interest in the account, is begging the question which the Court submitted to itself for answer. Actually, the Court has refused to decide the basic and vital issue raised by the first point, and the failure of the Trial Court to make a finding upon this issue is one of the grave errors of which appellant complains.

II.

The District Court Erred in Holding That the Evidence of Appellee (Exhibits F, H, I, J and K) Is Contradictory to the Resulting Trust Theory of Appellant.

Appellant respectfully submits that the Trial Court has fallen into the error of considering defendant's exhibits solely and apart from the entire testimony and out of context, instead of being part and parcel of the entire testimony which evidences, as a whole, the plan and arrangement by which NYK Tokyo forwarded the consideration to the Japanese Government, which then cabled the money to Consul Yoshio Muto in San Francisco, all in conformity with the prior agreement between the Secretary of State of the United States and the Japanese Government to have it appear that the NYK vessels had been requisitioned by the Japanese Government.

The error of the Trial Court is even more apparent when upon examination we find that the Trial Court, although referring to the testimony introduced by appellant (deposition of Hiroyoshi and the exhibits introduced by that witness of the correspondence between NYK Tokyo and the Japanese Government) as of questionable competence, nevertheless in its memorandum opinion embodies verbatim, as conclusively established facts, other portions of the said exhibits. Allow us to refer to the portion of the opinion which finds the following as established facts (Tr. pp. 39-40):

> "In the period immediately preceding the outbreak of war between the United States and Japan, various vessels owned by NYK operated between the two countries, carrying passengers and cargo. Among these was the M. S. Tatsuta Maru. During that period NYK

incurred various obligations to American creditors arising out of the operation of its vessels. When, on July 26, 1941, the President of the United States issued Executive Order No. 8832, extending to Japan and Japanese Nationals the freezing controls imposed upon other countries by Executive Order No. 8389, NYK became greatly concerned lest its American creditors attach its vessels in order to satisfy their claims and the Japanese Government became concerned lest it be unable to return its nationals from the United States to Japan. Efforts by the Japanese Government to have NYK exempted from the freezing order were unsuccessful and it was then decided that the same result could be accomplished if the Japanese Government requisitioned NYK's ships and operated them as Japanese Government requisitioned vessels. Accordingly, in October, 1941, the Tatsuta Maru was requisitioned by the Japanese Government and in that capacity it made its final voyage between the United States and Japan prior to the outbreak of war on December 7, 1941."

The above portion of the opinion is quoted verbatim from the document introduced by plaintiff which sets forth the actual agreement between NYK Tokyo and the Japanese Government (Plaintiff's Ex. 20-E). This error of the Trial Court is readily apparent from the inconsistent weight given by it to portions of the admitted testimony of appellant, as against other portions of the same testimony which the Court elects to totally disregard.

It is appellant's position that there is no contradiction in the evidence introduced by appellees and that introduced by appellant. All of the testimony has to be analyzed together: placed together, all of the evidence reveals a complete and consistent pattern of the steps taken to carry out the agree-

ment between the two nations to accomplish the purpose of having these vessels enter American waters without fear of attachment.

III.

The District Court Erred in Holding, as a Matter of Law, That the Evidence Before the Court Sustains a Finding That the Tatsuta Maru Was a Japanese Government Requisitioned Vessel.

It is the sincere opinion of appellant that every shred of evidence before the Trial Court sustained the legal conclusion that, as a matter of law, any purported requisition was merely one of form and not one of fact, was one of agreement as to outward appearance rather than a requisition of ownership and operation. Legally, in order to meet the test to which the evidence must be put before a court can find that there was a requisitioning in fact instead of in form only, the Court must find an actual position of ownership and operation on the part of the government involved. Appellant maintains that the requisitioning of *M.S. Tatsuta* by the Japanese Government, in accordance with the uncontradicted testimony of the agreement between the two governments, was a *formality* only, whereby the vessel was able to secure immunity from legal process by American creditors.

In order to properly present this legal question it may be well to cite the law controlling the question of the requisitioning of vessels: The dictionary definition of "requisition" is as follows:

> "State of being required for use or called into service. To require or take for use; press into service. To demand or take as by authority for military purposes, public needs, etc."
>
> The American College Dictionary, 1948.

The United States Court of Appeals for the Ninth Circuit in the case of

Mitsubishi Shoji Kaisha, Ltd. v. Societe Purfina Maritime (1942), 133 Fed.2d 552 (Cert. denied, 63 S.Ct. 858, 318 U.S. 781, 87 L.Ed. 1148)

on pp. 554-5 of the reported opinion of Judge Denman, states:

> "The word 'requisitioned' is not one of art. As was said by Lord Justice Pickford of the British Court of Appeals in The Broadmayne (1916) P. 64, 114 L.T.R. 891, 'There is no particular magic in the word (requisition) itself; it does not connote the same state of things in every particular case'. Its various meanings are determinable in a specific instance by other facts. It may mean that the vessel's title is taken, as in a condemnation proceeding, or her exclusive or partial use for the requisitioning government, or merely that her ownership and earnings remain in her owner, but only for such voyages as are permitted or directed by the government with a view to the national interest."

In the cited case a libel was filed by Societe Purfina Maritime, a Belgian corporation, hereinafter referred to as "Purfina", against Mitsubishi Shoji Kaisha, Ltd., a Japanese corporation, and against the diesel oil cargo owned by General Petroleum Corporation of California, and loaded for Mitsubishi's account on the Belgian tanker *Laurent Meeus* at San Pedro, California, for unpaid freight claimed earned under a charter dated September 21, 1940, executed by Purfina (the owner) and Mitsubishi for the carriage by the tanker of the oil to Japan. The charter made the cargo as well as Mitsubishi liable for the freight. The cargo was

seized under process in rem. General Petroleum appeared as claimant and contested the freight liability of the cargo. The District Court held that the cargo being loaded and the freight moneys due were earned and payable by Mitsubishi, though the voyage was frustrated by certain requisition orders served on the ship's master by representatives of the Belgian Government, and awarded the freight moneys against Mitsubishi and General Petroleum. The appeal was based on an allegation that there was no breach of the charter by Mitsubishi's non-payment of the freight money in that the requisition of the ship by the Belgian Government under order which prohibited the vessel from entering into time charters and required contemplated voyages to be approved by the Belgian Government, released the shipper from liability for freight under the existing charter. The question raised was whether the requisitioning had any more effect than to establish a governmental control over the voyages of the vessel by the owner on its own account. The court so held and affirmed the decree of the district court. On page 556 of the opinion the court stated as follows:

> "It seems clear that since Purfina managed the vessel and earned the freight for its own account and not as agent for the Belgian Government, the trusteeship of the net earnings after Purfina had discharged its obligations to Mitsubishi is not a matter of the latter's concern. The net funds were Purfina's property before delivery to the government *with its resultant trust interest.*" (Italic emphasis added.)

On the question of estoppel by virtue of the requisition, the court stated on p. 556 of the opinion as follows:

> ". . . Purfina is not estopped from claiming the freight by the act of the Belgian Government in taking over the tanker for its own use."

Thus, the court held that requisition of the vessel did not transfer the ownership and earnings from Purfina to the Belgian Government, but merely restricted the use of the vessel to such voyages as were permitted or directed by the Belgian Government. In

The Katingo Hadjipatera (1941), 40 F. Supp. 546

it was held that title to a Greek steamship requisitioned by the Greek Government did *not* pass to the Greek Government because (p. 548):

> ". . . no endorsement was made either upon the manifest or the register or any other documents of the ship to indicate that there had been any transfer or change of title to the vessel. The same is true of the papers that were filed in the Custom House at New York. . . . "I find that there was no physical possession of the vessel taken under the requisition for the Greek Government at any time prior to the filing of the libel by the libellants herein on March 7, 1941, and the seizure of the ship under the libel and under the writ of attachment."

The Court held that only the use of the vessel was requisitioned by the Greek Government.

Applying the above legal authorities to the uncontradicted facts in evidence, appellant respectfully submits that there is no conflict in the facts, and the only question before the Trial Court was one of the legal issues, to wit: Was the mere filing of an affidavit by Yoshio Muto, the Consul, stating that the Japanese Government had requisitioned

the vessel, the NYK San Francisco to operate the same as agent, and the rubberstamping of all documents with "Japanese Government Requisitioned Ship", sufficient in law to sustain a finding of requisition of ownership?

It may be well in discussing this question of requisitioning of a vessel, to examine the uncontradicted testimony before the Court:

The Government of Japan at no time took over the actual handling of the business of bunkering and outfitting the vessel at the port of call. As stated in Plaintiff's Exhibit 20-E, page 9 (Tr. 207-208):

> "Inasmuch as the *formality* of requisitioning the vessels involved was taken by the Imperial Government at the understanding of the American Government as already mentioned because of the fears of suits being filed for the claims of Americans against the Nippon Yusen Kaisha, *outwardly* the Consulates at the port of call were to take charge of all business in the name of the Imperial Government, but *in actuality, letters of attorney to handle the business were issued by the Consulates to the Yusen branch managers at the ports of call, who took over the business of the supervision of the Consuls concerned.*
>
> "Expenses relevant to the vessel involved and passage revenues at the ports of call shall be defrayed from or deposited in the special accounts *in the name of the Consuls,* especially set up at the Consulates of the ports of call as a result of the aforementioned Japan-American and Japan-Canada negotiations. *Outwardly,* the Consuls were to handle the accounts because of the fact that the vessels were requisitioned by the Government, but *inasmuch as all expenses coming from the assignment of vessels involved were borne by Nippon Yusen and the payments of the expenses were to be*

handled by Nippon Yusen, the managers of Nippon Yusen branch offices handled the receipts and disbursements at the supervision of the Japanese Consuls." (Italic emphasis added.)

Plaintiff's Exhibit 20-F contains the following statement concerning the operation of the vessel (Plaintiff's Exhibit 20-F, letter dated August 30, 1948 from Chief Accountant Bureau of Foreign Affairs Ministry to Chief of General Affairs Bureau, Ministry of Foreign Affairs, Japanese Government, Tr. 212-213):

"As documents relating to the said requisition order are untraceable, it is impossible to draw a clear conclusion as to *the nature of this requisition; however, deducing from various circumstances it is believed that in nature the ships were requisitioned ones of the Japanese Government on account of the freezing order of Japanese funds by the United States, but their operation and the relevant accounts were at the responsibility and risk of the Nippon Yusen Kabushiki Kaisha* . . . it is considered that the *operations for this case were to be executed on the account of the Yusen (Nippon Yusen Kabushiki Kaisha). It was only to avoid the freezing of funds that part of the funds was administered as special accounts of the Consulates.*" (Italic emphasis added.)

Plaintiff introduced into evidence, without contradiction, certain business records of NYK San Francisco (which had come into appellant's possession as trustee in bankruptcy of NYK) as follows:

1. NYK San Francisco office had possession and custody of the passbook of the Yoshio Muto Special Account (Plaintiff's Ex. No. 1, Tr. 94), also the checkbook of the

Muto Special Account in The Yokohama Specie Bank, Ltd. (Plaintiff's Ex. No. 2, Tr. 95), from which 66 checks had been removed and apparently used, all in the handwriting of NYK employees.

2. NYK kept a passenger record as to said Voyage 69-Home, in the same place and manner as it had been doing before the requisitioning of said vessel by the Japanese Government (Plaintiff's Exhibits Nos. 3 and 6, Tr. 96, 116).

3. NYK sold passage tickets and collected passage moneys for said voyage as principal and did not represent to the public that said passage tickets were sold and passage moneys collected by NYK as the agent of the Japanese Government (Plaintiff's Exhibits Nos. 4, 5, 8-14 inclusive, Tr. 102-8 and 117-131 inclusive).

4. In addition to the passenger fares collected and deposited in the Muto Special Account, NYK San Francisco, with the consent of the Japanese Government through its Consul General at San Francisco, validated and recognized outstanding steamship tickets issued many months before by NYK in Japan and elsewhere, and provided holders of such tickets with space upon the *Tatsuta Maru* for Voyage 69-H. All of such tickets had been sold and the money deposited to the account of NYK in various places, such as Yokohama, Tokyo, Seattle, Los Angeles, New York, etc. (Plaintiff's Exhibits Nos. 4, 7, 8, 9, 10, 11, 12, 15, 16, 20-I and 20-J, Tr. 102, 117-128, 132-4, 238-245 inclusive). The passenger fares collected by NYK and not deposited in the Muto account were at no time turned over to the Japanese Government. At no time did the Japanese Government request these funds remitted to it (Tr. 245-6).

5. Passage was furnished returning members of Japanese firms located in the United States, on the understand-

ing that the fares would be paid on arrival in Japan, exclusively to the NYK Tokyo office (Plaintiff's Exhibits Nos. 11, 17, 20-I and 20-J, Tr. 127, 134, 238-245 inclusive). Such payments were made to and received by NYK Tokyo, none of them ever being remitted to the Japanese Government, none of them ever deposited in the Muto Special Account in The Yokohama Specie Bank San Francisco (Plaintiff's Exhibits 20-I and 20-J, Tr. 238-245 inclusive).

There is no escape from the uncontradicted evidence that there was no change of ownership or operation of the *Tatsuta Maru* by the requisitioning of the vessel for Voyage 69-H by the Japanese Government; actual ownership and operation remained in NYK as before.

It is the position of appellant that all the evidence, including that submitted by the appellees, sustains only one legal conclusion: That any purported requisitioning of the *Tatsuta* was not a transfer of ownership and operation but merely a formality. In fact, the very act of paying to the NYK a "handling commission" and "agency fee" for services rendered (which services were the sole services necessary for the entire operation of the vessel on its return voyage) brings into further relief the absurdity of the claim that this vessel was a government requisitioned ship. The application for a license to receive these elaborately computed "commissions" was just one more link in the chain of steps taken in accordance with the plan by means of which the vessel's immunity from American creditors of NYK could be insured. In reality, the opportunity of NYK San Francisco to receive the sum of $4771.58 American money into its blocked account under the guise of an agency fee and handling commissions was a very welcome one, inasmuch as all direct applications made to the Treasury

Department by NYK San Francisco to receive monies into its account had been denied (Defendant's Ex. D, Tr. 307-312, inc.). Further, the exhibits introduced by appellant evidence that this payment of purported commissions and agency fees was taken as a deduction in determining the net amount the Japanese Government conceded to be due the NYK in this operation (Tr. 185-193; Exhibit 20-D attached to deposition of Hiroyoshi).

Appellant submits that as a matter of law the Trial Court committed an error in arriving at its decision, and that as a matter of law the only possible decision of the Trial Court was that the $39,000 initially deposited in the Yoshio Muto account was money actually received from NYK Tokyo, to which were added passenger fares, all diminished by the expenses of outfitting the vessel in San Francisco for the home voyage.

In support of plaintiff's position of having proven as a matter of law the existence of a resulting trust, it may be well to cite the law applicable to resulting trusts:

LAW GOVERNING THE SUBJECT MATTER.

In Federal Courts, except in matters governed by the Federal Constitution or Acts of Congress, the applicable law is the law of the State.

28 U.S.C.A., Sec. 725;

Erie R. R. Co. v. Tomkins (1938), 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

Therefore the law to be applied here in determining the question of resulting trust is the law of the State of California.

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made". *California Civil Code,* Sec. 853.

It has been held by decisions of the Courts of the State of California that the above principle proclaimed by C.C. 853 applies to transfers of personal property.

25 *Cal. Jur.* 181, par. 49;

Norman v. Burks (1949), 93 Cal. App.2d 687, 691 (209 P.2d 815);

Moore v. Wimmer (1946), 77 Cal. App.2d 199, 209 (174 P.2d 640);

Goes v. Perry (1941), 18 Cal.2d 373, 379 (115 P.2d 441);

Kirk White & Co. v. Bieg-Hoffine Co. (1935), 6 Cal. App.2d 188, 191 (44 P.2d 439);

Grant v. Heverin, 77 Cal. 263, 265 (18 P. 647);

Thompson v. Bank of California (1906), 4 Cal. App. 660, 666-8 (88 P. 987).

Wherever it appears that a claimant or his predecessor in interest voluntarily furnished the whole or a part of the consideration, the presumption or implication of law is that a resulting trust exists.

25 *Cal. Jur.* 180, par. 48;

O'Rourke v. Skellenger, 169 Cal. 270, 272 (146 P. 633);

Brown v. Spencer, 163 Cal. 589, 593 (126 P. 493);

Tryon v. Huntoon, 67 Cal. 325, 327 (7 P. 741).

"A resulting trust is implied from the facts, and neither written evidence of an agreement nor a fraud

on the part of the alleged trustee is essential to its existence. It arises where title of a property is vested in the trustee while the consideration therefor is paid by the beneficiary."

Bradley v. Duty (1946), 73 Cal. App.2d 522, at page 526 (166 P.2d 914).

Therefore once plaintiff, the Trustee in Bankruptcy has offered evidence establishing that the NYK supplied the money deposited in the account in question, the burden then shifts to the plaintiff in intervention to submit testimony denying the existence of such resulting trust.

PROOF NECESSARY TO ESTABLISH RESULTING TRUST.

As to the nature of the proof necessary to establish a resulting trust, California decisions have been liberal in allowing circumstantial and indirect evidence:

Hansen v. Bear Film Company, Inc. (1946), 28 Cal. 2d 154 (168 P.2d 946).

Citing from the *Hansen* case, the Court stated, page 175:

". . . Here the written instrument purported only to divest the transferor of title and vest it in the transferee. It contained no recital that the transferee was to hold the property for her own benefit, nor did it mention a trust or beneficial interest. Under the circumstances, the applicable rule, is that found in the Restatement, Trusts, section 38, subdivision 3: 'If the owner of property transfers it inter vivos to another person by a written instrument in which it is not declared that the transferee is to take the property for his own benefit or that he is to hold it in trust, extrinsic evidence may be admitted to show that he was intended to hold the property in trust either for the transferor or for a third party.' See also, *Beeler v. American*

Trust Co., 24 Cal.(2d) 1, 20-21 (147 P.2d 583); *Estate of Gaines,* 15 Cal.(2d) 255, 265 (100 P.2d 1055); *In re Kellogg,* 41 Cal. App.(2d) 833, 840 (107 P.2d 964)."

Applying the above law to the undisputed facts, this case presents no intricate legal questions. Basically, the Superintendent of Banks has on deposit $66,884.15 waiting for some claimant to prove ownership. No one has claimed this money other than the plaintiff Trustee in Bankruptcy. The time to file claims has long ago expired so there can be no other claimant. The claim of plaintiff in intervention is not a claim based upon the facts in the case, but only because the account stands in the name of an enemy alien. It is undisputed that plaintiff in intervention, the Alien Property Custodian, vested himself of this money (Vesting Order No. 256) the same as that official has vested himself of the property of the NYK to the extent of any surplus which may remain in the hands of the Trustee in Bankruptcy *after* payment of all allowed claims of American creditors (Vesting Order No. 371, Plf's Exhibit No. 31, Tr. 358).

All parties before this Court are custodians, charged with the duties of administering the estates of these enemy aliens. Plaintiff in intervention has conceded (Vesting Order 371 vesting the surplus) that the property rights of the NYK in the United States should be administered by the plaintiff Trustee in Bankruptcy, and has advised the Court that if the Court is satisfied that the funds in this account should go to the American creditors of the NYK, he has no objection (Def's. Exhibit L, Tr. 359-61 incl.). Under these facts it is indeed difficult to understand the position taken by the custodian, the Superintendent of

Banks. The Superintendent of Banks admits having no right to the funds other than to see that the money is paid to some individual after determination of his right to it by a court of competent jurisdiction. It is the only duty of the Superintendent of Banks to pay this deposit to the person entitled thereto, not to oppose, with the greatest intensity and on slight, flimsy, technical pretenses, the right of the *only* claimant, the trustee acting for American creditors, to obtain funds of the NYK in the United States.

This is not a case where the custodian has to make a choice among several claimants as to which is the rightful owner. Muto, representing the Imperial Government of Japan and in whose name the money stands in a Special Account, has made no claim to it. The Imperial Government, not only by direct statement but by its whole course of conduct, has expressly declared that the money belongs to the NYK. No one at any time has attempted to claim that a single penny of Government money ever went into this account.

The series of occurrences that culminated in the present situation are easily understood, and when understood, the legal principles required to come to a decision are so elementary that they hardly need comment, being nothing more than a decision that would be dictated by elementary law, namely, that when a person has established the fact that he is entitled to certain property which has been, for fully explained reasons, placed in the custody of some other person, that custodian should turn it over to the owner on demand,—particularly when there is no dispute as to the facts nor has any other person ever asserted a claim of any kind to the property.

It is not disputed that the NYK actually operated the *Tatsuta Maru,* paid the expenses of outfitting, collected fares, kept the records, etc. Nor is it disputed that such receipts and disbursements were handled through the mechanics of a "Special Account" in the name of the Consul; the fund in question results from an arrangement by which Japanese nationals in the United States and American nationals in Japan could return to their respective countries, at a time when war was believed inevitable, as expeditiously and efficiently as possible.

In the light of the above, appellant respectfully submits that the Trial Court erred, in a matter of law, in not finding that a resulting trust was in existence in favor of appellant.

IV.

The Court Erred in Holding That Said Transaction, if the Basis of a Resulting Trust, Was One in Violation of Federal Laws.

The Court in submitting the second question stated (Tr. 39):

> "Even if it did, was it a transaction to which the courts can give judicial recognition since it was in violation of Federal laws?"

In this respect the Court stated in its opinion as follows: (Tr. pp. 47-48):

> "Had plaintiff succeeded, however, his position would be no better. As to NYK the transfer of banking credits from YSB Tokyo to the Muto blocked account in YSB San Francisco and the deposit of additional moneys therein was an unlicensed transaction and hence illegal. The money was lawfully in this country only if the Government of Japan was the sole party having any interest in the fund. To recognize plaintiff's claim would be, in effect, to give judicial approval

to an illegal scheme designed to evade the provisions of the freezing order".

The Trial Court in its opinion relied entirely upon the case of *Propper v. Clark,* 337 U.S. 472, 69 S.Ct. 1333. It is the opinion of appellant that the *Propper* case does not stand for the conclusion reached by the Court. As a matter of fact, in our opinion, not only does the *Propper* case give no solace to the plaintiff in intervention, but it is one of the chief authorities upon which the trustee in bankruptcy relies. Since so much importance is attached to the *Propper* case, it may be well to carefully analyze the case and what it stands for. The facts are:

AKM, an Austrian firm, had a claim for royalties against ASCAP, an American association. On June 12, 1941 a creditor of AKM made an ex parte application for the appointment of a receiver and pursuant thereto a receiver was appointed by a New York State Court, said receiver taking possession of all funds with the sole purpose of liquidating AKM interests in the United States. On September 8, 1943 the Alien Property Custodian vested itself of all AKM credits and thereupon began an action in the New York Federal District Court to obtain these funds and a declaration of title in the Alien Property Custodian as against the receiver of the Austrian association. It was stipulated that no Treasury license was received by the State receiver.

The sole issue before the Supreme Court was as follows:

In a Federal case did title to funds of an Austrian association in the hands of an American debtor pass, upon the receivership appointment, to the receiver of the Austrian

association by an unlicensed judicial transfer (operation of law)?

The Supreme Court held that the transfer of a credit resulting from a liability owed by the American association to the Austrian association, to a liability owed by said American association to the receiver of the said Austrian association, violates the prohibition against transfers of credit, as no license was obtained. In brief, the Supreme Court held that a court of law by judicial process could not transfer title to a credit without first having obtained a license from the Treasury Department. In other words, under the Propper decision, the only thing the Supreme Court decided was that a receiver, or for that matter this trustee, could not, without first obtaining a license from the Treasury Department, have *title* to any funds subject to the freezing order, declared as being in the receiver or trustee. Title cannot shift by operation of law from person to person except by license, and possession by such receiver is without right.

Let us now squarely analyze the question of whether the trustee in bankruptcy in the case at bar falls within any of the restrictions and limitations covered by the *Propper* case. We cannot too emphatically urge this Court that we are not in this proceeding seeking to have the fund of Muto actually transferred over to the trustee in bankruptcy. To request such a determination by this Court we concede would require the necessity of the trustee securing a license from the Treasury Department. Without such a license, we concede, the trustee could not take title.

But that is very far afield from what the trustee in this case is requesting. The trustee is not requesting possession

of the account, but merely a judicial determination of the respective rights of the Office of Alien Property as the successor in interest of the Empire of Japan, as against the trustee in bankruptcy as successor of the American creditors of the NYK. In our case we are only asking the Court to determine in whom beneficial title to the fund should rest, and, if in this litigation that issue should be determined in favor of the trustee in bankruptcy, then the trustee would have to file an application with the Treasury Department for a license, and only after procuring such a license could the Yoshio Muto funds be transferred into his name.

At this stage of the proceedings the only issue before the Court is, who has the greater right to title to the funds, the Alien Property Custodian or the American creditors of the NYK; all we are requesting of the Court is that there be a factual determination of rights between the two claiming parties, with the understanding that there can be no *actual* transfer, after this Court's determination, without the securing of a license. The real issue before the Court is not whether any transaction involved herein is unlicensed and therefore null and void as in the *Propper* case, but, who is factually entitled to the money in the account. In our case a transfer by the respective parties would be made only after a license has been granted. We cannot too strongly emphasize that what we are seeking is to have the respective rights between two parties clarified, and only after such clarification by the Court would the implication of the *Propper* case come into force. We maintain that the *Propper* case has no application to the case at bar until this Court makes a determination in favor of the trustee in bankruptcy.

In fact, appellant relies upon the *Propper* case and other like decisions for substantiation of his right to come before the District Court for a judicial determination of the right to this fund as between the Office of Alien Property and the trustee in bankruptcy.

The Supreme Court in the *Propper* case, p. 1340, states:

> "(5) It is true that state litigation between local claimants and foreign owners or those in possession of blocked or frozen assets could proceed to a determination of rights between the claimant and the foreign national without the blocked property passing into hands that might use it to the detriment of the welfare of this nation, so long as payment could not be made without a license. Nothing in the Trading with the Enemy Act or regulations specifically forbids eo nomine litigation in state courts. The plan for prohibition of unlicensed transactions by foreign nationals comprehends blocking of transfers of credits and vesting of local assets of such nationals under the Trading with the Enemy Act and regulations thereunder. If transactions are blocked, vesting may or may not follow. When the Custodian vests blocked property, title passes to the Custodian and his authority to vest and hold cannot be questioned except as provided in the Trading with the Enemy Act. The freezing order of June 14, 1941 immobilized the assets covered by its terms so that title to them might not shift from person to person except by license until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected. United States v. Chemical Foundation, 272 U.S. 1, 11, 47 S.Ct. 1, 4, 71 L.Ed. 131; Silesian-American Corp. v. Clark, 332 U.S. 469, 476, 68 S.Ct. 179, 182, 92 L.Ed. 81."

and at p. 1341:

> "(9) It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this."

Thus the *Propper* case does allow for litigation between persons claiming rights in a blocked account, to determine their respective rights to the funds in such account.

The Supreme Court by its further action in

> *Lyon v. Singer,* 70 S.Ct. 903, 339 U.S. 841, 94 L.Ed. 1323,

reaffirmed the above basic principle of law, and definitely went so far as to state that a determination between the parties can be had, provided such determination be subject to the securing of a license. It may be well to quote from the case, p. 904:

> "Oral argument and study of the record have convinced us that the judgments of the New York Court of Appeals are not inconsistent with the First War Powers Act of 1941, Sec. 301, 55 Stat. 839, 50 U.S.C.A. Appendix, Sec. 616, or the above Executive Orders. We accept the New York court's determination that under New York law these claims arose from transactions in New York and were entitled to a preference. *Since the*

New York court conditioned enforcement of the claims upon licensing by the Alien Property Custodian, federal control over alien property remains undiminished. Our decision in Propper v. Clark, 337 U.S. 472, 69 S. Ct. 1333, 93 L.Ed. 1480, *does not require a contrary conclusion.* There the liquidator claimed title to frozen assets adversely to the Custodian, and sought to deny the Custodian's paramount power to vest the alien property in the United States. No such result follows from the New York court's judgment in the present cases." (Italic emphasis added.)

In the New York case of

Commission for Polish Relief v. Banca Nationala a Rumanie, 30 N.Y.S. 2, 690, 262 App. Div. 543,

(which is a case on all-fours with the case at bar and was an action between two aliens) the Court held that money in a blocked account was subject to American creditors' rights, provided a license was subsequently secured. In this case plaintiff, a domestic membership corporation, sued a foreign private banking corporation and in such action levied an attachment upon a fund due the foreign corporation in the hands of a Delaware non-profit corporation. The Court approved such action but made the judgment contingent upon the granting of a license. At p. 694 the Court stated:

"The prohibition (of Executive Order) as indicated, extends only to the payment or transfer of the funds. Clearly the sole purpose of the order was to prevent the funds of certain foreign nations, including Rumania, and their nationals, from falling into the hands of aggressor powers. To accomplish this proper result and for no other or different purpose, the banks in this country are prohibited from paying out or transfer-

ring credits due to such foreign nations or their nationals, *without first obtaining the required license from the Treasury Department.*" (Italic emphasis added.)

Furthermore, the Treasury Department by its own ruling, of which this Court will take cognizance and which we asked the Court's leave to introduce in evidence, specifically authorized the conduct of litigation between the respective parties interested in a particular blocked account.

General Ruling No. 12 of the Treasury Department issued under Executive Order 8389 as amended (and which is the ruling declaring transfers of property in a blocked account effected without a license to be null and void), nevertheless specifically, by Section (4) of the Ruling, authorizes and allows parties to proceed with litigation to have their respective rights to a blocked account determined:

"General Ruling No. 12

* * *

"(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; PROVIDED, HOWEVER, That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

Applying the above legal principles to the facts of the case at bar, we submit on behalf of appellant representing the American creditors, that the *Propper* case and all other authorities cited hereinabove affirmatively establish the right of the American creditors of the NYK to have any and all of their rights against the Empire of Japan determined in a Court of competent jurisdiction. This action is taken within the framework of the Executive Orders, and is not an attempt to bypass the Executive Orders.

CONCLUSION

It is submitted that the judgment appealed from is clearly erroneous and should be reversed, and the cause remanded, with directions to the Court below to enter judgment for plaintiff.

Dated: San Francisco, California
March 14, 1952

Louis J. Glicksberg,
Attorney for Appellant.